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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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|---|---|
| ALMONT AMBULATORY SURGERY CENTER, LLC, a California limited liability company, et al.,<br><br>Plaintiffs,<br>v.<br><br>UNITEDHEALTH GROUP, INC.; UNITED HEALTHCARE SERVICES, INC., UNITED HEALTHCARE INSURANCE COMPANY; OPTUMINSIGHT, INC., and DOES 1 through 20,<br><br>Defendants. | Case No. 2:14-cv-03053-MWF(VBKx)<br>Hon. Michael W. Fitzgerald<br><br>[Related to Case No. 2:14-cv-02139]<br><br>**COUNTERCLAIM DEFENDANTS' NOTICE OF MOTION AND MOTION FOR AN ORDER:**<br><br>**(1) RELEASING TO COUNTERCLAIM DEFENDANTS ONLY FOR *IN CAMERA* REVIEW AFFIDAVITS FILED UNDER SEAL IN SUPPORT OF WARRANTS; OR**<br><br>**(2) IN THE ALTERNATIVE, RECUSING MAGISTRATE** |

UNITED HEALTHCARE SERVICES, INC., UNITED HEALTHCARE INSURANCE COMPANY; OPTUMINSIGHT, INC.,

Counterclaim Plaintiffs,

v.

ALMONT AMBULATORY SURGERY CENTER, LLC, a California limited liability company; et al.,

Counterclaim Defendants.

**JUDGE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

[28 U.S.C. § 455(a); Local Rule 72-5]

[Proposed] Order and Declaration of Charles L. Kreindler filed concurrently]

Hearing
Date: Monday, February 2, 2015
Time: 10:00 a.m.
Courtroom: 1600, 16th Floor, 312 N. Spring Street

Discovery Cutoff: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

TO THE ABOVE-CAPTIONED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 2, 2015, at 10:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Michael W. Fitzgerald, in Courtroom 1600, 16th Floor of the United States District Court, Central District of California, located at 312 N. Spring Street, Los Angeles, CA 90012-4701, Individual Counterclaim Defendants Michael Omidi, M.D. and Julian Omidi and Plaintiffs and Counterclaim Defendants Almont Ambulatory Surgery Center, LLC, et al. (collectively "Counterclaim Defendants") will and hereby do move, pursuant to 28 U.S.C. § 455(a) and Local Rule 72-5, for: (1) an order releasing to Counterclaim Defendants only for *in camera* review the Government's affidavits filed under seal in support of warrants Magistrate Judge Victor B. Kenton issued in connection with the ongoing criminal investigation of Counterclaim Defendants to aid Counterclaim Defendants in determining whether to seek recusal of Magistrate Judge Kenton from this action and Case No. 2:14-cv-02139, to which this action is related and in which certain Counterclaim Defendants are Plaintiffs (together "Actions"); or, in the alternative (2) an order recusing Magistrate Judge Kenton from the Actions. This Motion is made on the ground that Magistrate Judge Kenton's "impartiality might reasonably be questioned" because of his knowledge of the contents of the affidavits filed under seal in support of the warrants he issued.

This Motion is based upon this Notice, the concurrently filed Declaration of Charles L. Kreindler, all pleadings and other papers filed in this case, matters of which the Court may take judicial notice, and such oral argument as may be presented at the hearing on this Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 that took place on December 23, 2014.

Dated: January 5, 2015

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Charles L. Kreindler
CHARLES L. KREINDLER
Attorneys for Individual Counterclaim Defendants Michael Omidi, M.D. and Julian Omidi

Dated: January 5, 2015

HOOPER, LUNDY & BOOKMAN, P.C.

By: /s/Daron L. Tooch
DARON L. TOOCH
Attorneys for Plaintiffs and Counterclaim Defendants Almont Ambulatory Surgery Center, LLC, et al.

# MEMORANDUM OF POINTS AND AUTHORITIES

Litigants have a constitutional right to due process, which includes a fair and detached judge to preside over their judicial proceedings. (*See Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972).) Under 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The test for recusal under subdivision (a) of section 455 is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." (*Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416 (9th Cir. 1995).)

Here, Magistrate Judge Kenton, who hears discovery matters in the Actions, informed the parties during a discovery hearing on December 12, 2014 that he would "likely" recuse himself should Counterclaim Defendants move for his recusal because he had issued warrants in connection with the ongoing criminal investigation of Counterclaim Defendants. (*See* Declaration of Charles L. Kreindler ["Kreindler Decl."], ¶¶1-2 & Exh. A [pp. 17:25-20:22].) In issuing the warrants, Magistrate Judge Kenton became privy to the contents of the Government's affidavits filed under seal in support. (*Id.*, ¶2 & Exh. A [pp. 18:19-25, 19:13-22].) Those warrants were executed in 2014. (*Id.*, ¶2.)

Since Magistrate Judge Kenton has become familiar with at least some of the issues in the Actions, having already heard and ruled on two discovery motions in Case No. 2:14-cv-03053 (DKT 91 & 92), recusal will entail some duplication of effort and inefficiencies. Consequently, Counterclaim Defendants would prefer to avoid recusal unless it is ***necessary*** to ensure impartiality. Counterclaim Defendants believe that they cannot make a fully informed determination regarding the ***necessity*** for recusal without knowing what information Magistrate Judge Kenton was exposed to in the Government's affidavits. (Kreindler Decl., ¶3.) Thus, in the first instance, Counterclaim Defendants request that the Government's affidavits be released *in camera* to them only to make that determination. Counterclaim Defendants have a constitutional right to examine the affidavits in support of the warrants now that they have been executed. (*See In re Search Warrants Issued Aug. 29, 1994*, 889 F.Supp. 296, 299 (S.D. Ohio 1995) (Fourth Amendment rights "include[] the right to examine the affidavit that supports a warrant after the search has been conducted"); *In re Search of 8420 Ocean Gateway Easton, Md.*, 353 F.Supp.2d 577, 579 (D. Md. 2004) (finding post-search "Fourth Amendment constitutional right to examine the search warrant affidavit").) The "pre-indictment right of access" to affidavits supporting warrants has been recognized by courts nationwide, including in the Ninth Circuit. (*In re Searches & Seizures*, No. 08-SW-0361, 2008 WL 5411772 at *3 (E.D. Cal. Dec. 19, 2008 (collecting cases).)

In the alternative, if it is not possible for the Government's affidavits to be released to them for *in camera* review, then Counterclaim Defendants believe that the test for recusal—"impartiality might reasonably be questioned"—has been met, and request an order for recusal of Magistrate Judge Kenton and assignment of another Magistrate Judge to hear discovery matters in the Actions.

Dated: January 5, 2015

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Charles L. Kreindler

CHARLES L. KREINDLER
Attorneys for Individual Counterclaim Defendants Michael Omidi, M.D. and Julian Omidi

Dated: January 5, 2015

HOOPER, LUNDY & BOOKMAN, P.C.

By: /s/Daron L. Tooch

DARON L. TOOCH

Attorneys for Plaintiffs and Counterclaim Defendants Almont Ambulatory Surgery Center, LLC, et al.